Cairn Energy India Pty Ltd & Anor v The Government of India

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–333 OF 2009
SURIYADI, HASAN LAH AND JEFFREY TAN JJCA
13 OCTOBER 2009

Arbitration — Award — Setting aside — Whether there was error on face of award made by tribunal that justified interference by court — Whether judge in setting aside award made by tribunal was exercising appellate jurisdiction

Cairn Energy India Pty Ltd ('the first appellant') and Ravva Oil (Singapore) Pte Ltd ('the second appellant') and two other companies entered into a production sharing contract ('PSC') with the Government of India, the respondent. Through the PSC the parties had agreed to exploit the Ravva oil fields which had been earmarked for development. Disputes arose between the parties and one of these disputes was the dispute that gave rise to the present cause of action. The dispute was in respect of the 'costs recoveries' claimed by the appellants and the calculation of the post tax rate of return ('PTRR') for production sharing purposes calculated by the appellants ('the issue'), and the bone of contention was the PSC. As agreed, the parties referred their disputes for arbitration. Although the arbitral proceeding was conducted at the Permanent Court of Arbitration in the Hague it was agreed by the contesting parties that the PSC was governed by Indian law, that the law that governed the arbitration agreement was English law and that because the seat and procedural law was that of Malaysia, the law applicable was the Arbitration Act 1952. When the Arbitral Tribunal ('the tribunal') decided in favour of the appellants in respect of the issue ('the award'), the respondent filed an application in the High Court of Malaya to challenge the award. The challenge however was only in respect of the issue that required judicial attention and not the whole award. After hearing the respondent's application the High Court found that there was a manifest error of law on the face of the award and that the majority arbitrators were in error in finding the issue in favour of the appellants. The court therefore set aside the award of the tribunal. This was the appellants' appeal against the decision of the High Court. In their grounds of appeal the appellants submitted that although the judicial commissioner ('JC') had identified the correct legal principles he had wholly failed to apply those tests correctly in arriving at his decision. The appellants also submitted that the JC had erred when he interfered with the award on the issue when the tribunal's finding was final and 'beyond curial

interference' and when he had held that the arbitral tribunal had relied on commercial sense and ignored the provisions of the PSC. The main issue to be considered in this appeal was whether there was any error on the face of the award made by the tribunal that justified interference by the court.

Held, allowing the appeal with costs here and below:

(1) (per **Suriyadi JCA**) Having scrutinised the partial award, the notes of proceedings and the grounds of judgment it was clear that there was no manifest error of construction on the face of the award that required the court's interference. The JC's grounds of judgment did not disclose any erroneous legal proposition considered by the arbitrators in the course of their deliberation, or the presence of any of the exceptions in the like of any illegality, incorporated document, or the award itself such as to vitiate the award. Mere repetitive mention of legal precepts without sufficient contextual discussion would not make the JC's finding any more supportable. In fact, the JC had briefly assumed the duties of the arbitrators and assumed the role of an appellate court thereby ignoring the wishes of the contesting parties to have the matter arbitrated (see para 19).

(2) (per **Suriyadi JCA**) The fact that the majority of the arbitrators had been persuaded by the construction of the appellants did not mean that the tribunal had acted so erroneously that a court must set aside that finding. A difference of opinion in the construction of the facts and provisions in the light of the majority arbitrators' plausible conclusion was insufficient ground to conclude that a manifest error on the face of the award had been established (see para 24).

(3) (per **Jeffrey Tan JCA**) The High Court identified the error of construction of the PSC as the error of law but an error of construction was not a sufficient ground to set aside the award. The issue, which concerned an interpretation of the PSC, was a question of construction and therefore a specific question of law for which there is no 'curial interference'. Hence the construction of the PSC and the examination of the correctness of the award by the JC could not be endorsed. Further, as against the construction by the tribunal the High Court had a different construction, which evidently meant that the court had treated the application as an appeal. Even if the issue before the High Court was a question of mixed law and fact, it was still not open to the court to reopen the issue or to construct the PSC because it had no appellate powers (see paras 44–46).

(4) (per **Jeffrey Tan JCA**) An examination of the arbitral record showed that the tribunal had reached its decision by construction of the PSC

and therefore it was not legitimate to say that the tribunal had referred to commercial sense against the provisions of the PSC. Reference to commercial sense was incidental to underline the fact that the final decision was not illogical (see para 47).

[Bahasa Malaysia summary

Cairn Energy India Pty Ltd ('perayu pertama') dan Ravva Oil (Singapore) Pte Ltd ('perayu kedua') dan dua lagi syarikat telah menandatangani kontrak perkongsian pengeluaran ('KPP') dengan Kerajaan India, responden. Melalui KPP pihak-pihak bersetuju untuk mengeksploit medan minyak Ravva yang telah diperuntukkan untuk pembangunan. Pertikaian-pertikaian timbul di antara pihak-pihak dan salah satu pertikaian tersebut yang menimbulkan kausa tindakan ini. Pertikaian ini berkenaan dengan 'costs recoveries' yang dituntut oleh perayu-perayu dan pengiraan kadar cukai selepas pulangan ('KCSP') untuk perkongsian pengeluaran dikira oleh perayu-perayu ('isu'), dan hujahan utama berhubung KPP. Sepertimana yang dipersetujui, pihak-pihak merujuk pertikaian mereka kepada timbang tara. Walaupun prosiding timbang tara dijalankan di Mahkamah Tetap Timbang Tara di Hague, ianya telah dipersetujui oleh pihak-pihak lawan bahawa KPP tertakluk oleh undang-undang India, bahawa perjanjian timbang tara tertakluk di bawah undang-undang Inggeris dan oleh sebab bidang kuasa dan undang-undang prosedur daripada Malaysia, maka undang-undang yang boleh digunapakai ialah Akta Timbang Tara 1952. Apabila tribunal timbang tara ('tribunal') memutuskan memihak perayu-perayu mengenai isu tersebut ('award'), responden memfailkan satu permohonan di Mahkamah Tinggi Malaya untuk mencabar award tersebut. Walau bagaimanapun, cabaran tersebut hanya berkenaan isu yang memerlukan perhatian kehakiman dan bukannya keseluruhan award. Selepas mendengar permohonan responden, Mahkamah Tinggi mendapati terdapat kesilapan undang-undang yang nyata pada award tersebut dan bahawa majoriti penimbang tara khilaf dalam dapatan isu memihak perayu-perayu. Oleh itu mahkamah mengetepikan award tribunal. Ini merupakan rayuan perayu-perayu terhadap keputusan Mahkamah Tinggi. Dalam alasan rayuan perayu-perayu menghujah bahawa walaupun pesuruhjaya kehakiman ('PK') telah mengenalpasti prinsip undang-undang yang betul, dia gagal menggunapakai ujian-ujian tersebut untuk membuat keputusan dengan betul. Perayu-perayu juga menghujah bahawa PK telah khilaf apabila dia mencampuri isu award apabila dapatan tribunal adalah muktamad dan 'beyond curial interference' dan apabila dia memutuskan bahawa tribunal timbang tara telah bergantung kepada maksud komersial dan tidak mengendahkan peruntukan-peruntukan KPP. Isu utama yang perlu dipertimbangkan dalam rayuan ini ialah sama ada terdapat apa-apa kesilapan pada award yang dibuat oleh tribunal yang membolehkan campur tangan mahkamah.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) (oleh **Suriyadi HMR**) Selepas meneliti sebahagian award, nota-nota prosiding dan alasan penghakiman adalah jelas bahawa tiada kesilapan pentafsiran yang nyata pada award yang memerlukan campur tangan mahkamah. Alasan penghakiman PK tidak menzahirkan apa-apa kesilapan usul undang-undang yang dipertimbangkan oleh para penimbang tara semasa pertimbangan mereka, atau apa-apa pengecualian seperti kepenyalahan undang-undang, dokumen yang diperbadankan, atau award tersebut yang mencacatkan award. Sekadar menyebut rukun undang-undang tanpa perbincangan kontekstual tidak menjadikan dapatan PK disokong. Sebaliknya, PK telah mengambil alih kewajipan penimbang tara-penimbang tara dan mahkamah rayuan dan tidak mengendahkan kehendak pihak-pihak yang mahukan perkara tersebut ditimbang tara (lihat perenggan 19).

(2) (oleh **Suriyadi HMR**) Fakta bahawa majoriti penimbang tara diyakinkan oleh pentafsiran perayu-perayu tidak bermaksud tribunal telah bertindak secara salah sehingga mahkamah perlu mengetepikan dapatan tersebut. Perbezaan pendapat dalam tafsiran fakta dan peruntukan-peruntukan berbanding dengan kesimpulan munasabah majoriti penimbang tara bukanlah alasan yang mencukupi untuk memutuskan kesilapan yang nyata pada award telah terbukti (lihat perenggan 24).

(3) (oleh **Jeffrey Tan HMR**) Mahkamah Tinggi telah mengenalpasti kesilapan tafsiran KPP sebagai kesilapan undang-undang tetapi kesilapan tafsiran bukanlah alasan yang mencukupi untuk mengetepikan award tersebut. Isu berkenaan tafsiran KPP, merupakan persoalan tafsiran dan oleh itu merupakan persoalan khusus undang-undang yang mana tidak terdapat 'curial interference'. Oleh itu pentafsiran KPP dan pemeriksaan ketepatan award oleh PK tidak boleh diendors. Selanjutnya, berlainan dengan pentafsiran tribunal, Mahkamah Tinggi mempunyai tafsiran berbeza yang membuktikan bahawa mahkamah memperlakukan permohonan tersebut sebagai satu rayuan. Walaupun isu di Mahkamah Tinggi merupakan campuran persoalan undang-undang dan fakta, mahkamah tidak boleh membuka semula isu tersebut atau mentafsirkan KPP kerana ia tidak mempunyai kuasa rayuan (lihat perenggan 44–46).

(4) (oleh **Jeffrey Tan HMR**) Daripada pemeriksaan rekod timbang tara menunjukkan bahawa tribunal tersebut telah membuat keputusan dengan mentafsirkan KPP dan oleh itu adalah tidak sah untuk mengatakan bahawa tribunal tersebut merujuk kepada maksud komersial dan bukannya maksud peruntukan-peruntukan KPP.

A Rujukan kepada maksud komersial adalah berkaitan untuk menegaskan fakta bahawa keputusan akhir adalah logik (lihat perenggan 47).]

Notes

For cases on setting aside, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras B 1366–1427.

Cases referred to

Burford UK Properties Ltd and others v Forte Hotels (UK) Ltd (formerly Trust House Forte) and others [2003] EWCA CIV 1800, CA (refd)

C *Cenargo Ltd v Empresa Nacional Bazan de Construcciones Navales Militares SA QBD* [2002] EWCA Civ 524, CA (refd)

Chai Ming & Co v The Overseas Assce Corpn Ltd [1962] MLJ 282, HC (refd)

Champsey Bhara Co v The Jivraj Balloo Spinning & Weaving Co Ltd AIR 1923 PC 66 (refd)

D *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, FC (refd)

Finelvet AG v Vinava Shipping [1983] 2 All ER 658 (refd)

Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd [2003] I MLJ 49, CA (refd)

Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428, SC (refd)

E *Government of Kelantan v Duff Development Co Ltd* [1923] AC 395, HL (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481, CA (refd)

Hodgkinson v Fernie (1857) 3 CBNS 189, SC (refd)

F *Intelek Timur Sdn Bhd v Future Heritage* [2004] 1 MLJ 401, FC (refd)

King v Duveen [1913] 2 KB 32 (refd)

Maitland Main Collieries Pty Ltd v Xstrata Mt Owen Pty Ltd 2006 NSWSC 1235, CA (refd)

Miramar Maritime Corp v Holborn Trading; The Miramar [1984] AC 676, [1984] 2 All ER 326, [1984] 3 WLR 10, HL (refd)

G *Pembinaan LCL Sdn Bhd v SK Strofoam (M) Sdn Bhd* [2007] 4 MLJ 113, CA (refd)

Puri Construction Pvt Ltd v Union of India AIR 1989 SC 777 (refd)

Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd [1994] 2 MLJ 770, SC (refd)

H *Shanmugam Paramsothy v Thiagarajah Pooinpatarsan & Ors* [2001] 6 MLJ 305, HC (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210, HC (refd)

I *Union of India v Rallia Ram* AIR 1963 SC 1685 (refd)

Whitehead Mann Ltd v Cheverny Consulting Ltd [2006] EWCA Civ 1303 (refd)

Worsdell v Holden 1 LT 14 (refd)

Wynn Las Vegas, LLC v Mong Henry [2009] HKCU 940, HC (refd)

Legislation referred to
Arbitration Act 2005 ss 23, 24, 24(2)

Appeal from: Originating Motion No R3(2)–25–256 of 2004 (High Court, Kuala Lumpur)

Vinayak Pradhan (Ooi Huey Min with him) (HM Ooi Associates) for the appellants.
Robert Lazar (Rodney Gomes, Alexius Lee with him) (Shearn Delamore & Co) for the respondent.

Suriyadi JCA:

[1] The appeal came before us and we unanimously allowed it with costs, for here and below, whereupon the order of the High Court, which was in favour of the Government of India ('the respondent'), was set aside. The appeal came about as the learned judicial commissioner ('JC'), had set aside the finding over an issue ('the relevant issue') in the award, decided by the majority arbitrators in favour of the appellants on 12 January 2009.

[2] I now reproduce the factual matrix and they are as follows. Cairn Energy India Pty Ltd and Ravva Oil (Singapore) Pte Ltd ('the appellants') and the respondent had a contractual relationship pursuant to an agreement called the Production Sharing Contract dated 28 October 1994 ('the PSC'). The respondent, through the PSC had agreed to exploit the Ravva oil fields in India with a few companies viz the appellants, Petrocorn India Ltd and Oil and Natural Gas Corporation Ltd (ONGC). The appellants and Petrocorn India Ltd, are collectively called the companies whilst the companies together with ONGC, are collectively referred to as the 'contractor'. Trouble brewed between the appellants and the respondent resulting in the disputes being referred for arbitration. The arbitral tribunal delivered awards on six issues, of which four were in favour of the respondent and two in favour of the appellants, with the relevant issue before us being one of the latter. The respondent being dissatisfied with the decision over the relevant issue caused an application to be filed at the High Court of Malaya. The relevant issue brought by the successful respondent reads as follows:

> whether the companies are entitled to include in the accounts, for the purposes of PTRR calculation in accordance with the provisions of article 16 and Appendix D of the PSC, sums paid by the companies in accordance with article 3.3 of the PSC (the question).

[3] The relevant provisions mentioned in that reference are reproduced herewith, beginning with article 3.3, which reads:

3.3 ONGC Carry

In consideration of ONGC having paid the Past Costs, the Companies covenant to ONGC that they shall:

(a) during the Transfer Period, pay the share of Exploration Costs, Development Costs and Production Costs incurred by the Operator; and

(b) after the Transfer Period, pay the share of Contract Costs,

that would otherwise be payable by ONGC, in the proportion that their respective Participating Interests bear to their total Participating Interests, until such time as the amount paid by the Companies pursuant to this Article 3.3 equals the amount that is equivalent to the Companies' total Participating Interest share of the difference between Past Costs and Transfer Period Net Revenue PROVIDED THAT the Companies' obligations under this Article 3.3 shall not exceed the sum of thirty three million US Dollars (US$33 million) less an amount equivalent to the Companies' total Participating Interest share of Transfer Period Net Revenue to which but for Article 7.5(c) the Companies would otherwise be entitled. Thereafter, Contract Cost shall be borne and paid by the Companies and ONGC in proportion to their Participating Interest.

[4] Article 15 reads:

ARTICLE 15

RECOVERY OF COSTS FOR OIL AND GAS

15.1 Contractor Entitled to Recover Contract Costs and Past Costs

The Contractor shall be entitled to 100% of the total volumes of Petroleum produced and saved from the Contract Area in accordance with the provisions of this Article until the value of such Petroleum entitlement, after deduction of all applicable levies including all Royalty and Cess paid in respect of Petroleum produced and saved from the Contract Area, is equal to Contract Costs together with Past Costs. For the avoidance of doubt, it is agreed that Past Costs shall not exceed the sum of fifty five million US Dollars ($US55 million) for the purposes of cost recovery.

[5] Article 16 reads:

ARTICLE 16

PRODUCTION SHARING OF PETROLEUM BETWEEN CONTRACTOR AND GOVERNMENT

16.1 Profit Petroleum Determined by PTRR Method

(a) The Contractor and the Government shall share in the Profit Petroleum from the Contract Area in accordance with the provisions of this Articles.

(b) The share of Profit Petroleum, in any Year, shall be calculated for the Contract Area on the basis of the Post Tax Rate of Return actually achieved by the Companies at the end of the preceding Year for the Contract Area as provided in Appendix D.

[6] Appendix D is reproduced thus:

(ARTICLES 16.4)

CALCULATION OF THE POST TAX RATE OF RETURN FOR PRODUCTION SHARING PURPOSES

1. In accordance with the provisions of Article 16, the share of the Government and the Contractor respectively of Profit Petroleum from any Filed in any Year shall be determined by the Post Tax Rate of Return (hereinafter referred to as PTRR) earned by the Companies from the Contract Area at the end of the preceding Year. These measures of profitability shall be calculated on the basis of the appropriate net cash flows as specified in this Appendix D.

2. In order to assess the PTRR earned by the Company(ies) in the Contract Area over any period up to the end of any particular Year, the following net cash flow of the Company(ies) arising from the Contract Area for each Year separately will first be calculated as follows:

(i) Cost Petroleum entitlement of the Companies as provided in Article 15; plus

(ii) Profit Petroleum entitlement of the Companies as provided in Article 16; plus

(iii) the Companies' share of all incidental income (of the type specified in Section 3.4 of the Accounting Procedure) arising from Petroleum Operations; less

(iv) the Companies' share of those Production Costs incurred on or in the Contract Area; less

(v) the Companies' share of those Exploration Costs (if any) incurred in the Contract Area; less

(vi) the Companies' share of Development Costs in the Contract Area, which, for the purposes of this paragraph 2(vi), shall be all of the Development Costs without regard to the provisions of Articles 15.5(b); less

(vii) the notional income tax, determined in accordance with paragraph 7 of this Appendix, payable by the Companies on profits and gains from the Contract Area.

A provided, however, that any costs or expenditures which are not allowable as provided in Section 3.2 of the Accounting Procedure shall be excluded from Contract Costs and disregarded in the calculation of the annual net cash flow.

B 3. ...

[7] This appeal should actually be contained within the four walls of a singular argument of the respondent as the learned JC had recorded:

C I have stated earlier in this judgment that the GOI initially raised three grounds of challenge. However, towards the end of the submissions of the parties, GOI concedes its application is based 'primarily' on error of law on the face of the award. Counsel for GOI stressed that the majority arbitrators had erroneously construed the provisions of the PSC; this is an error of law on the face of the award
D that is not an appellate error.

[8] Despite the above finding, surprisingly the appellants in this appeal had gone beyond the concession of the respondent, when they went over board
E and discussed even the abandoned issues. In fact, unconsciously even the learned JC had acted overzealously and followed the path of the appellants. Regardless of the approach undertaken by the appellants there is a need to lay down certain common grounds as agreed by the contesting parties, inter alia:

F (a) the PSC is governed by Indian law (article 33);

(b) the arbitration agreement is governed by English law (article 34);

(c) the seat and procedural law is that of Malaysia;

(d) the law applicable is the Arbitration Act 1952;
G

(e) the arbitration was held at the Hague;

(f) only the relevant issue required judicial attention and not the whole award;

H (g) the relevant issue in the award was set aside by the learned JC on the premise of a 'manifest error of law (ie on a matter of construction) on the face of the award';

(h) the learned JC had alleged that the purported error of construction
I came about as the principles applied were not countenanced by law; and

(i) had also opined that it was erroneous for the majority arbitrators to have alluded to commercial sense in the face of clear contractual wording.

[9] The appellants in their submission admitted that the learned JC had identified the correct legal principles but wholly failed to apply those tests correctly in arriving at his decision. So what are the errors alleged by the appellants to have been committed by the learned JC? According to the appellants:

(a) the learned JC had no jurisdiction to interfere with the award on the relevant issue on the basis of an alleged manifest error of law on the face of the award;

(b) as the learned JC opined that the relevant issue involved a 'mixed question of fact and law', he erred in not considering that the relevant issue would involve the determination of a question of contract construction under Indian law ie a foreign law, which was a question of fact. That being so the finding of the tribunal was final and beyond curial interference;

(c) having erroneously decided that the relevant issue referred to the tribunal was not a specific reference, the learned judge embarked on a reassessment and reexamination of the evidence on merit, and was influenced by the adoption of the words, 'commercial sense in the face of clear contractual wording' by the majority of the tribunal; and

(d) had a proper application of the principles of law taken place, the learned JC would have realised that the relevant issue in the award was not open to curial interference.

[10] Before moving on, I shall lay down some of the general legal principles that need consideration, in order to arrive at a correct decision. It is accepted that parties in arbitration cases agree to choose such a mode, and the particular tribunal as in this appeal, to carry out the task of resolving their disputes. With such meeting of the mind, an award of an arbitrator therefore is ordinarily final and conclusive, unless a contrary intention is provided for in the agreement. Even if a civil court is entrusted with power to facilitate arbitration and effectuate an award, it has no appellate powers over that decision if it has been reached fairly (*Union of India v Rallia Ram* AIR 1963 SC 1685; *Puri Construction Pvt Ltd v Union of India* AIR 1989 SC 777). In *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113 Gopal Sri Ram JCA (as he then was) said:

> It is the unanimous view of all the authorities that the High Court in exercising its statutory jurisdiction under the Arbitration Act 1952 does not enjoy appellate jurisdiction. See for example, *Puri Construction Pvt Ltd v Union of India* AIR 1989 SC 777, where it was held that:

A … a court while examining the objections taken to an award filed by an arbitrator is not required to examine the correctness of the claim on merits. The court cannot sit in appeal over the views of the arbitrator by reexamining and reassessing the materials.

B **[11]** In *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 at p 487, again the Court of Appeal in same vein remarked that at common law, 'absent a contrary intention in the agreement to arbitrate entered into between the parties to a controversy, the award is final, binding and conclusive. It may not be challenged merely on the ground that it is C erroneous'.

[12] Returning to the appeal at hand, it is pertinent to distinguish first whether when deciding the dispute referred to the tribunal it had to D determine a question of law, which had become material in its decision to the dispute referred, or was it a situation where only a specific question of law was referred to it. For the former category, interference is possible if an error of law appears on the face of the award. As stated above this was the only ground supplied by the respondent at the end of the submission, after abandoning E the other two, as recorded by the learned JC in his grounds of judgment.

[13] In *Champsey Bhara Co v The Jivraj Balloo Spinning & Weaving Co Ltd* AIR 1923 PC 66, Lord Dunedin explained briefly what 'an error on the face of the award' meant. He clarified that if one could find in the award or a F document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment some legal proposition, which was the basis of the award, and erroneous at that, then 'an error on the face of the award' has occurred. Additional to that exception an error on the face of the award exists if it was the result of corruption or fraud (*Hodgkinson* G *v Fernie* (1857) 3 CBNS 189). In *Chai Ming & Co v The Overseas Assce Corpn Ltd* [1962] MLJ 282, endorsing the above case of *Champsey Bhara Co v The Jivraj Balloo Spinning & Weaving Co Ltd*, the court reiterated that it could interfere but only if there were to be an error of law on the face of the awards.

H **[14]** But then again a court certainly cannot interfere with the award if a specific question of law was referred for the decision of the arbitrator, with parties being bound by it, although erroneous. Perhaps this was the reason why the respondent ignored this ground whilst the appellants propagating otherwise. As it was the respondent's view that its case falls or stand on the I ground of 'error of law on the face of the award', I have deliberately refrained from discussing this 'specific question of law' argument, on the want of necessity. The only advertence to it was primarily to express my view whether it was a specific question posed or otherwise. On this argument Channel J in *King v Duveen* [1913] 2 KB 32 adequately said:

... but it is equally clear that *if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside*. Otherwise it would be futile ever to submit a question of law to an arbitrator ...

... He has either given an erroneous decision on a specific question of law which was referred to him, or he has decided a question of fact. In either case no grounds exist for setting aside the award. (Emphasis added.)

[15] In *Government of Kelantan v Duff Development Co Ltd* [1923] AC 395 Viscount LC said:

If that is so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. *But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion.* (Emphasis added.)

[16] In this appeal the learned JC had concluded that the question posed to the arbitrator was not a specific question posed but rather a mixed bag of law and facts hence entitling interference if necessary. In clear terms, he remarked:

In essence, the arbitral tribunal was asked to decide on a mixed question of fact and law, namely whether the sums paid by the companies under article 3.3 could be included in the accounts for calculating the PTRR according to article 16 and Appendix D. Admittedly, a question of construction of the relevant provisions is involved (a question of law), but this is a question of law which arises and becomes material in deciding the dispute referred to it. *This reference is therefore not a reference on a specific question of law within the meaning of the category of cases mentioned* ... in which no challenge is possible, even if an error of law can be shown (Emphasis added.)

[17] The learned judge was very careful in choosing his words, and I am in absolute agreement with the above statement. I am satisfied that the relevant issue posed involved a mixed bag of law and facts. No judicial activism is required on my part to confirm that a question of construction of the relevant provisions was involved, material in deciding the dispute referred to it. Was there then any error on the face of the award justifying interference here? Was there anything which came in the form of say, the award, any document actually incorporated thereto stating some erroneous legal proposition, or the

majority arbitrators having proceeded on some illegality, which formed the basis of the award (see also *Intelek Timur Sdn Bhd v Future Heritage* [2004] 1 MLJ 401).

[18] The learned JC when arriving at a differing view in the application before him to that of the majority arbitrators, as reflected in the grounds of judgment, inter alia, stated:

a ... I find on the facts of this application such a *manifest error of construction* that this court's interference is made necessary to correct an injustice to GOI;

b It was wrong for the *majority arbitrators* to have ignored the plain meanings of the words in the relevant provisions and *included 'commercial sense'* in the process …;

c What can be *included* for the purposes of the PTRR calculation ... *is the companies share of contract costs* not sums paid by the companies ...;

d I find therefore that the facts of this application fit within the established ground of an arbitral tribunal deciding on a matter of *construction on principles not countenanced by law*;

e … That the majority arbitrators are *in error* in concluding that the companies are entitled *to include in* the accounts, for the purposes of the PTRR calculation …; and

f On balance, and since I have found a manifest error of law on the face of the relevant portion of the partial award ... that … portion ... be set aside ... (Emphasis added.)

[19] Having scrutinised the partial award, the notes of proceedings, and the ground of judgment, regretfully I am unable to conclude that a manifest error of construction on the face of the award had successfully been established requiring the court's interference. I failed to find anywhere in the grounds of judgment of the learned JC discussing any erroneous legal proposition considered by the arbitrators in the course of their deliberation, which was the basis of the award, or presence of any of the exceptions in the like of any illegality, incorporated document, or the award itself, which could vitiate the award. He clearly failed to highlight, by demonstrating the erroneous route the arbitrator had undertaken, when stating the law or that the conclusion was wrong, thus driving the court to assume that the arbitrators did not properly understand the principles, despite stating the correct law (*Finelvet AG v Vinava Shipping* [1983] 2 All ER 658). Mere repetitive mention of legal precepts without sufficient contextual discussion will not make the learned JC's finding any more supportable.

[20] To arrive at the decision that he did, the learned JC went through the exercise of examining the correctness of the claim on merits viz by re-examining and re-assessing the materials and had treated the application before him as if it was an appeal. This was obvious as he recorded amongst others:

> *What can be included in the accounts for the purposes of PTRR calculation on the basis of the companies' net cash flow, is the companies' share* of contract costs not sums paid by the companies as the of the contract costs that would have been payable by ONGC under article 3.3. This is expressly stated as being in consideration for past costs paid by ONGC
>
> In effect, therefore, ONGC's share of EDP and contract costs paid by the companies, by express agreement between the companies and ONGC is payment for past costs. *Thus I agree with the conclusion of GOI's counsel* that the 'past costs paid was ONGC's share of production costs'.
>
> It is also *difficult to reconcile the conclusion of the majority arbitrators* with s 3.2 of the accounting procedure (Appendix C) which makes it abundantly clear on its clear wording that costs and charges incurred before the effective date are not costs recoverable and allowable under the contract for costs recovery and production sharing purposes under the contract.

[21] We were made aware that the provisions not only were painfully convoluted but carried many unfamiliar terms in the like of contract costs, cost petroleum, effective date, exploration, development and production costs, production sharing contract, profit petroleum, ONGC carry, post tax rate of return, terms which carried special meanings and which the arbitrators were more equipped to resolve. They had the time, witnesses, and necessary expertise before them to construe and arrive at the correct decision.

[22] Generally, to reopen or re-examine the merits of the case and in effect determine, and replace, the findings of the majority arbitrators with the learned JC's view, would fly against all established principles. To arrive at his decision, he undertook a thorough and lengthy examination and a long drawn out process of reasoning, and that prima facie did not help to establish the assertion that there was an error apparent on the award. There was nothing so manifest or clear that required interference. He, briefly had assumed the duties of the arbitrators, assumed the role of an appellate court, and culminating in ignoring the wishes of the contesting parties to have the matter arbitrated.

[23] Could one say that the majority arbitrators' decision was so obviously wrong? The appellants here had a different interpretation to the provisions mentioned in the question posed to the arbitrators. They canvassed that those provisions dealt with current matters. They dealt with issues of net cash flows and profits actually achieved, and have no historical reference. The appellants'

approach and stance as regard the construction, though different to that of the respondent, was just that ie the matter was appreciated from a different perspective. Professor MP Jain in *Administrative Law of Malaysia and Singapore* at p 373 had authored:

> It will not be an error of law apparent on the face of the record where two reasonable interpretations of law are possible and the tribunal has adopted one of them. The court will not interfere with the tribunal's decision on the ground that it has adopted one interpretation but not the other which was favourable to the individual, or that the view adopted by the tribunal appears to the court to be less reasonable than the alternative construction. If, however, only one interpretation of the law is possible and the body concerned does not adopt it, the court may interfere.

[24] There was nothing improper for the majority arbitrators to have been persuaded by the construction of the appellants, and could not be said to have acted so erroneously that a court must set aside that finding. It was just a question of the arbitrators choosing one reasonable construction over the other. It cannot be overly emphasised that a difference of opinion in the construction of the facts and provisions, and in light of the majority arbitrators' plausible conclusion, is insufficient ground to conclude that a manifest error of law had been established, which allegedly had caused an error on the face of the award.

[25] Based on the above reasoning, let alone on the face of the award the error was not self-evident or manifest, I allowed the appeal with costs, for here and below and accordingly set aside the High Court order. The majority arbitrators' partial award pertaining to the relevant issue was to be reinstated and the deposit refunded. My brothers Hasan Lah JCA and Jeffrey Tan Kok Wha JCA have also agreed to allow the appeal with costs but on a slightly different ground.

Jeffrey Tan JCA:

[26] This appeal arose from an application pursuant to ss 23 and/or 24 of the Arbitration Act 1952 (now repealed and replaced by the Arbitration Act 2005 which came into force on 16 March 2006) by the Government of India (GOI) to the court below to set aside and or to remit for the reconsideration of the arbitral tribunal, of a part of the arbitral award.

[27] These are the pertinent background facts. The geographical area described as the 'Ravva field' off the coast of India and in Indian territorial waters was first explored by a GOI owned corporate known as Oil and Natural Gas Corporation Ltd (ONGC). Commercial deposits of oil first

discovered in 1987 were thereafter developed by ONGC. Sometime in 1992, GOI decided to tender some of its oil fields to the private sector for development on a joint venture basis. The Ravva field was one such field offered for development with the participation of ONGC. Cairns Energy India Pty Ltd ('Cairns'), Ravva Oil (Singapore) Pte Ltd ('Ravva') and Videocom Petroleum Ltd ('Videocom') were successful in their bid to develop the Ravva field. A Production Sharing Contract ('PSC') was entered into between GOI of the one part and Cairns, Ravva, ONGC and Videocom of the other part. The two other agreements simultaneously executed (Joint Operating Agreement and Petroleum Mining Lease) were not relevant to the arbitral proceeding or to the application below. It was the PSC that was the bone of contention. The dispute concerned the 'costs recoveries' claimed by Cairns and Ravva, and the 'calculation of Post Tax Rate of Return (PTRR) for production sharing purposes' computed by Cairns and Ravva.

[28] In the arbitral proceeding, GOI was the respondent, while Cairns and Ravva were the claimants. Videocom was claimant in a separate arbitration proceeding. In the application to the court below, GOI was the applicant, while Cairns and Ravva were the respondents. In this appeal, the appellants are Cairns and Ravva, while the respondent is GOI.

[29] The arbitral proceeding itself was conducted at the Permanent Court of Arbitration at the Hague. But it had been agreed by the parties that the legal seat of arbitration was Kuala Lumpur. Hence, the application by GOI was to the court below.

[30] Six issues were put to and decided by the arbitral tribunal (see 693AR). Four issues were held in favour of GOI. Two issues were held in favour of Cairns and Ravva. In the court below, the challenge by GOI was only against the award on the following issue:

> Whether the companies are entitled to include in the accounts, for the purposes of PTRR calculation in accordance with the provisions of article 16 and Appendix D of the said contract, sums paid by the companies in accordance with article 3.3 of the said contract (hereinafter referred as the said issue).

[31] On that issue, the award of the arbitral tribunal (by a majority) read as follows:

> Determines that the companies are entitled to include in the accounts, for the purposes of PTRR calculation (in accordance with the provisions of article 16 and Appendix D of the said (contract), sums paid by the companies in accordance with article 3.3 of the said contract ('the award').

[32] Three grounds were raised in the court below by GOI to challenge the award, namely, (a) error of law on the face of that award, (b) excess of jurisdiction, and (c) misconduct by the majority arbitrators. The court below held that misconduct had not been made out, and that the majority arbitrators had acted within jurisdiction (see p 68 of the appeal record). But the court below found that there was a manifest error of law on the face of the award and that the majority arbitrators were in error in finding the issue in favour of Cairns and Ravva. The court below set aside the award of the arbitral tribunal. Against that order of the court below, Cairns and Ravva appealed. From GOI, there is no appeal.

[33] In relation to the legal arguments here, briefly stated, it was contended by Mr Vinayak Pradhan for the appellants that it was a specific question of law that was put to the abitral tribunal and that therefore the award of the arbitral tribunal could not be the subject of curial interference, while it was contended by Mr Robert Lazar for the respondent that there was an error of law on the face of the award. However, both learned counsel agreed that the proper law of the PSC was Indian law, that the law that governed the arbitration agreement was English law, and that the curial law, but of course, was Malaysian law.

[34] The remedy of 'error of law on the face of the award' was not provided in the Arbitration Act 1952. But Malaysian law was not and is not limited to the Arbitration Act alone. '… courts in Malaysia have regularly considered arbitration applications on the basis that the remedy of error on the face of the award is available for consideration under our law. In *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428, the Supreme Court referred to *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 and accepted that the remedy of error of law on the face of the award is available to be considered. In a more recent case, *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 at p 488, the Court of Appeal recognised that the jurisdiction of the ordinary courts in the environment of private arbitration stems from statute and common law … the courts here have the jurisdiction to set aside an award on the ground of error of law on the face of the award' (*Shanmugam Paramsothy v Thiagarajah Pooinpatarsan & Ors* [2001] 6 MLJ 305 per KC Vohrah J, as he then was) ' … the court can intervene and set aside an award where on the face of it, there are serious errors of law (*Shanmugam Paramsothy v Thiagarajah Pooinpatarsan & Ors* [2004] 5 MLJ 31 per Raus J, as he then was) 'as the jurisdiction in the environment of private arbitration stems from both statute and common law' (*Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 per Gopal Sri Ram JCA, as he then was).

[35] But before I get to what is an error of law, it is important to consider the role of a court in the environment of private arbitration. There is a wealth of authorities on the role of a court, but *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113 is as good as any for an overview of the law. In that case, Gopal Sri Ram JCA, as he then was, laid out the principles that govern an application to set aside or remit an arbitral award as follows:

> Now before I state my views on the approach adopted by the learned judge to the application before him I consider it essential to advert to the principles that govern an application of the kind that the learned judge dealt with in this case. For that purpose, I need go no further than three authorities. First, judgment of Raja Azlan Shah J (as His Highness then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 which is an authority that has been repeatedly quoted from and applied. Here are the relevant passages at pp 210–211:
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> > It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between these two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one. Instances of the former are afforded by *Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592; *British Westinghouse Electric & Manufacturing Co Ltd v Underground Railways Co of London Ltd* [1912] AC 673; *Hodgkinson v Fernie* 3 CB (NS) 189; 140 ER 712, and *Attorney-General for Manitoba v Kelly & Ors* [1922] 1 AC 268 at p 281 (PC); *Government of Kelantan v Duff Development Co Ltd* [1923] AC 395 at p 411 and *In re King and Duveen* [1913] 2 KB 32 are instances of the latter.
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> > In the present case I have on consideration come to the conclusion that no question of law was referred. What was submitted to the arbitrator was a question of law which incidentally, and indeed necessarily, arose in applying ascertained facts. The reference involved both composite questions of law and fact. The court can therefore review the award if and when there is error apparent on the face of the award.
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> > Let me state here that this is not a rehearing. My sole purpose is to determine whether there is error of law on the face of the award. With regard to the first point, I am not satisfied that the arbitrator had drawn wrong inferences of fact from the evidence. Even if he did, that by itself is not sufficient as a ground to warrant setting aside the award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood' (see *In re Great Western Railway Co And HM's Postmaster-General* (1903) 19 TLR 636).

The second authority is *Union of India v Rallia Ram* AIR 1963 SC 1685 where Shah J, when delivering the judgment of the Indian Supreme Court said:

> An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary courts. The court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The court has also power to remit the award when it has left some matters, referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is apparent on the face of the award. The court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception. But the court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievance in the manner provided by the arbitration agreement.

Third, and last, in *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401, Siti Norma FCJ said at p 407:

> The law regarding the effect of an arbitrator's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such, if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself is not sufficient to warrant the setting aside of his award.

It is the unanimous view of all the authorities that the High Court in exercising its statutory jurisdiction under the Arbitration Act 1952 does not enjoy appellate jurisdiction. See for example, *Puri Construction Pvt Ltd v Union of India* AIR 1989 SC 777, where it was held that:

> … a court while examining the objections taken to an award filed by an arbitrator is not required to examine the correctness of the claim on merits. The court cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the materials.

[36] Richard Malanjum JCA, as he then was, in *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49 outlined those principles as follows:

Before dealing with the grounds in this appeal, perhaps it is opportune here to have a quick overview of some of the legal principles relating to power of the courts to set aside an award of an arbitrator. And to begin with, I think the statement of law and the discourse therein in the case of *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 require no further clarification. This is what Gopal Sri Ram JCA said at pp 487–488:

> The general rule at common law is that, absent a contrary intention in the agreement to arbitrate entered into between the parties to a controversy, the award of an arbitrator is final, binding and conclusive. It may not be challenged merely on the ground that it is erroneous. As Shah J said in *Union of India v Rallia Ram* AIR 1963 SC 1685 at p 1691:
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> ...
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> So jealously did the common law guard against curial interference with private arbitrations that it was most reluctant to create exceptions to the general rule. The policy of the common law is reflected in the judgment of Williams J, in *Hodgkinson v Fernie* (1857) 3 CBNS 189 where he said:
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> > The law has for many years been settled, and remains so at this day that, where a cause or matters in difference referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact … The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted is now, I think firmly established, viz where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted I think it may be considered as established.
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> Thus, the common law as a very limited exception grudgingly allowed a court to intervene and set aside an award on the face of which it appeared an error of law. That is an important exception that prevails until today. In *Champsey Bhara v The Jivraj Balloo Spinning & Weaving Co Ltd* AIR 1923 PC 66, Lord Dunedin, when delivering the advice of the Board, explained the breath of this limited common law jurisdiction over arbitration awards. He said (at p 69):
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> > An error of law on the face of the award means, in Their Lordships' view, that you can find in the award or document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound.

Quite apart from the common law, the jurisdiction of the ordinary courts in the environment of private arbitration stems also from statute.

...

In my judgment, the jurisdiction to set aside or to remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and with a proper sense of responsibility. One may do well to keep in mind the words of Sharma J in *Puri Construction Pvt Ltd v Union of India* AIR 1989 SC 777 at p 780:

> When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits.

Hence, by way of summary the relevant legal principles applicable to the present case may be shortly stated thus:

Firstly, on findings of facts an arbitrator is the sole judge. Further, whether he drew the wrong inferences of facts from the evidence itself is not sufficient as a ground to warrant setting aside his award (see *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555).

Secondly, when dealing with an award of an arbitrator the court is not rehearing the matter. The court is only to determine if there is an error of law on the face of the award. And as to what is 'error of law' Raja Azlan Shah J (as he then was) had this to say in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 at p 211:

> Let me state here that this is not a rehearing. My sole purpose is to determine whether there is error of law on the face of the award. With regard to the first point, I am not satisfied that the arbitrator had drawn wrong inferences of fact from the evidence. Even if he did, that by itself is not sufficient as a ground to warrant setting aside the award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood' (see *In re Great Western Railway Co and HM's Postmaster-General* (1903) 19 TLR 636). The allegation that the arbitrator held that the plaintiffs were estopped from challenging the validity etc of the progress payment certificates is based on a false premise. I find nowhere in the award that the arbitrator had stated his finding on such lines. With reference to the third objection, the plaintiffs argued that the correct interpretation of their letter was 'that the works not mentioned in their letter had been fully completed,' but the arbitrator interpreted it 'that the works mentioned therein had not yet started and that it did not mean that the works not mentioned therein had been fully completed'. The said letter was strongly relied upon by the plaintiffs to substantiate their allegation that the superintending officer had not given sufficient and adequate attention with regard to the measurement of works done. In my opinion the question is one of construction and of applying it. As long as it is capable of a meaning it will ultimately bear that meaning which the arbitrator decides is its proper construction, and the arbitrator will decide its application. Assuming the arbitrator had erred in interpretation, that in my opinion was only a mistake on

his part. That per se is not sufficient as a ground to set aside the award. *Worsdell v Holden* 1 LT 14 is the authority for the well established principle that misconstruction of letters of an arbitrator as amounting to a mistake is not a ground for revoking the award. Parties who submit their cases to arbitration know fully well that arbitrators are fallible; they consent to take them with all their faults. In my judgment, in the context in which the letter was written, the arbitrator was correct in arriving at his conclusion after comparing the visiting manager's reports dated 11 January and 28 January 1967. I am satisfied that the award contains no error of law on its face.

Thirdly, s 24(2) of the Arbitration Act 1952 reads:

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

In considering that section, this is what Hashim Yeop A Sani J (as he then was) had to say in the case of *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105 at p 106:

As referred to earlier in the judgment s 23 of the Arbitration Act 1952 seems to confer a wide discretion for the court to remit an award. However, the power of the court to set aside an award is not unlimited and s 24(2) of the Act provides that the High Court may set aside an award only where an arbitrator or umpire has misconducted himself or the proceedings or the award had been improperly procured. The language of s 24(2) would seem to be rather narrow and limited. In other words, the power of the High Court to set aside an award is restricted to cases where some form of dishonesty or bias is shown.

Fourthly, since our Arbitration Act 1952 (the Act) is derived from the then English Arbitration Act 1950 the legal principles enunciated by the English courts are quite relevant. Thus, in 2 *Halsbury's Laws of England*, (4th Ed) para 623 states:

An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. *In order to be a ground for setting aside the award, an error in law on the face of the award, must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.*

If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit it being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; *but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence*

> *which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award* (see also *Government of Kelantan v Duff Development Company, Limited* [1923] AC 395). *But the court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award; it must take the award at its face value* (see also *James Clark (Brush Materials), Limited v Carters (Merchants), Limited* [1944] KB 566) (Emphasis added.)

[37] '… a question of construction is generally speaking a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion' (*Government of Kelantan v Duff Development Company, Limited* [1923] AC 395 at p 409 per Viscount Cave LC). In *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd*, the Federal Court per Siti Norma Yaakob FCJ, as she then was, thus reaffirmed that a question of construction is a question of law and that an award on a question of law can only be side aside on limited grounds.

> … I consider that the matter for arbitration falls within the first category of cases which had been distinguished by *Sharikat Pemborong* namely that when deciding the dispute that had been referred to him the arbitrator had also to determine a question of law which had become material in his decision to the dispute referred. That said, interference is possible if an error appears on the face of the award. In *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428, the Supreme Court in laying down the principles when an arbitrator's award can be set aside had, inter alia, adopted those that have been identified in *Halsbury's Laws of England* (4th Ed) at p 334 para 623 to be as follows:
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> > … and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

[38] The principles that pertain to the instant appeal may be abridged as follows. In the environment of private arbitration, 'the award is final, binding and conclusive and can only be challenged in exceptional circumstances' (*Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd*). '… the High Court in exercising its statutory jurisdiction under the Arbitration Act 1952 does not enjoy appellate jurisdiction' (*Pembinaan LCL Sdn Bhd v SK Styrofoam*). 'An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him

is ordinarily not liable to be challenged on the ground that it is erroneous … The court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The court has also power to remit the award when it has left some matters, referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is apparent on the face of the award. The court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception. But the court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties' to place their grievance in the manner provided by the arbitration agreement' (*Union of India v Rallia Ram*; *Hartela Contractors Ltd v Hartecon JVC Sdn Bhd*). '… where a cause of matters in difference referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact … the only exception to that rule are cases where the award is the result of corruption or fraud' (*Hodgkinson v Ferne*) or where there is error of law on the face of the award (*Champsey Bhara v The Jivrau Balloo Spinning & Weaving Co Ltd*). '… it is not a rehearing. My sole purpose is to determine whether there is error of law on the face of the award … that the arbitrator had drawn wrong inferences of fact from the evidence... is not sufficient as a ground to warrant setting aside the award'. (*Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*). 'It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him … in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one' (*Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*). '(Where the) reference involved both composite questions of law and fact … (the) court can … review the award if and when there is error apparent on the face of the award' (*Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*). A question of construction is generally speaking a question of law (*Government of Kelantan v Duff Development Company, Limited*; *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd*). '…where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the

face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award' (*Halsbury's Laws of England*, and cited with approval in *Ganda Edible Oil Sdn Bhd v Transgrain BV*). 'The jurisdiction to set aside or to remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and responsibility' (*Hartela Contractors Ltd v Hartecon JVC Sdn Bhd*).

[39] In so far as the court below was concerned, 'in the case of the latter ground (reference on a specific question of law), no interference is possible on the ground that the decision on the question of law is erroneous. In the case of the former (where a question of law becomes material), the court can interfere if an error of law appears on the face of the award' (see p 48AR). In so far as Cairns and Ravva were concerned in the court below, the issue was a specific reference and one of interpretation (see p 53AR). And in so far as GOI were concerned in the court below, 'the application is based primarily on error of law on the face of the award' (see p 54AR) and that 'as a matter of construction of the PSC, the award is clearly wrong, and this is not a case where there can be two plausible views' (see p 55AR). The stand of Cairn and Ravva in the court below could not be any clearer: it was a specific question of law. The stand of GOI was that it was a matter of construction of the PSC but there was an error of the face of the award.

[40] Whatever it might have been, the issues that confronted the court below were (a) whether the issue referred to the arbitral tribunal was a specific question of law, and (b) whether there was an error of law on the face of the award. That was appreciated by the court below (see p 64AR). But how the court below had gone about it, to answer those issues, was another matter altogether. The court below answered the first issue as follows (see p 65AR):

> To recapitulate, the issue that was eventually framed in the terms of reference was 'Are the Companies entitled to include in the accounts, for the purposes of PTRR calculation in accordance with the provisions of article 16 and Appendix D of the said contract, sums paid by the companies in accordance with article 3.3 of the said contract'. See Chapter V, para 220 of the partial award of the PSC.
>
> In essence, the arbitral tribunal was asked to decide on a mixed question of fact and law, namely whether sums paid by the companies under article 3.3 could be included in the accounts for calculating the PTRR according to article 16 and Appendix D. Admittedly, a question of construction of the relevant provisions is involved (a question of law), but this is a question of law which arises and becomes material in deciding the dispute before it. The reference is therefore not a reference on a specific question of law within the meaning of cases mentioned in, for example, *Sharikat Pemborong Pertanian & Perumahan*, on which *no challenge is possible, even if an error of law can be shown.* (Emphasis added.)

[41] With those few words, the court below then proceeded with alacrity to the issue on the error of law on the face of the award. But with respect, where were the all important reasons for the findings (i) 'that the arbitral tribunal was asked to decide on a mixed question of fact and law', (ii) 'that the question of construction of the relevant provisions … is a question of law which arises and becomes material in deciding the dispute before it', and, (iii) that 'the reference is therefore not a reference on a specific question of law within the meaning of cases mentioned in, for example, *Sharikat Pemborong Pertanian & Perumahan* …' If truth be told, there were no reasons for those findings by the court below. And with respect, those findings were not only ipse dixit but were also entirely inexplicable.

[42] The issue was 'whether the companies are entitled to include in the accounts, for the purposes of PTRR calculation in accordance with the provisions of article 16 and Appendix D of the said contract, sums paid by the companies in accordance with article 3.3 of the said contract'.The acid test as to whether it was a question of construction was this; could the issue be answered by a construction of the PSC, of the relevant provisions thereof? If it could be so answered, then it was a specific question of construction and no more. Alternatively, if it could not be so answered without the prior or concurrent findings of disputed facts, then it was not so specific a question of construction. Only then could it be a question of mixed fact and law. But in the instant case, all that the arbitral tribunal had done was to construct the PSC. Indeed, the arbitral tribunal fully appreciated that it was all down to the construction of the PSC. In its summary of the relevant facts (see 1084AR, at p 1086AR), the arbitral tribunal put the respective case of the parties as follows:

> Within the context of the present arbitration, the claimants seek a declaration as to the proper interpretation of the pertinent provisions of the PSC which in their opinion bear on the claimants' entitlement...
>
> The respondent (GOI) disputes the entitlement of the claimants to any of the declarations sought and submits that the proper construction of the relevant provisions of the PSC leads to the rejection of all claims submitted by the claimants, and — according to the respondent's statement of amounts due and payable by the Government of India by claimants of 10 April 2004 — the awarding to GOI of sums amounting to US109,210,000 against claimant No 1 (Cairns) and US60,663,000 against claimant No 2 (Ravva), plus interest.

[43] The parties at the arbitration proceeding also appreciated that what was called for was a construction of the PSC, for all oral arguments at the arbitration proceeding (see 1115AR–1132AR) only addressed the interpretation of the provisions of the PSC without so much as a word on any real and or perceived question of fact.

A **[44]** As for the arbitral tribunal, there could be no doubt that it had disposed the issue 'whether the companies are entitled to include in the accounts, for the purposes of PTRR calculation in accordance with the provisions of article 16 and Appendix D of the said contract, sums paid by the companies in accordance with article 3.3 of the said contract' by
B construction of the provisions of the PSC. The following examination of the award at 1135AR–1148AR (where the issue was deliberated by the arbitral tribunal) only showed that the arbitral tribunal had not strayed beyond construction of the PSC. At para 229 of 1136AR, the arbitral tribunal observed that the issue 'must commence with reference to articles 15(1) and
C (6). At paras 230 and 231 of 1137AR, the arbitral tribunal applied the definitions in the PSC to the expressions in article 15. At para 232 of 1137AR, the arbitral tribunal ruled on the effect of article 15(1). At paras 233 and 234 of 1138AR, the arbitral tribunal dealt with the definitions of 'profit sharing', 'cost petroleum', and held that 'past costs' was not provided for in
D article 16. At paras 235 and 236 of 1138AR, the arbitral tribunal examined the provisions of Appendix D and held that Appendix D was at the heart of the issue. At para 236 of 1139AR, the arbitral tribunal held that the calculations in s 2 only took into account the entitlements and expenses of the companies. At para 237 of 1140AR, the arbitral tribunal set out the
E salient parts of article 3. At para 238 of 1140AR, the arbitral tribunal ruled on the effect of articles 3 and 35.6. At paras 239 andicle 240 of 1141AR, the arbitral tribunal ruled on the provisions relating to 'contract costs'. At paras 241–245 of 1142AR–1143AR, the arbitral tribunal made its observations on the claimants' submission on the construction of the PSC. At paras 246–247
F of 1143AR–1144AR, the arbitral tribunal again summarised GOI's submission on the construction of the PSC. And at paras 248–260 of 1144AR–1148AR, the arbitral tribunal then addressed and ruled on those legal submissions. The arbitral award on the issue was reached without any finding of fact. As said, the arbitral tribunal had only dealt with the issue by
G construction of the PSC. There was definitely no issue of any question of fact at the Hague. There was also no issue of any question of fact at Kuala Lumpur. The legal submission of GOI in the court below was that 'the majority arbitrators had erroneously construed the provisions of the PSC; this is an error on the face of the award …' (see 54AR) and that 'as a matter of
H construction of the PSC, the award is clearly wrong …' (see 55AR). No issue was raised by GOI in the court below (see summary of GOI's legal arguments in 56AR) that the issue before the arbitral tribunal was anything but a question of construction of the PSC. Given that none had advocated so, and there was really nothing in it for to suggest so, then there could be no
I question of the issue being a question of mixed fact and law. Indeed at 67AR and 68AR, the court below held that 'it was a manifest error of construction' and that 'the facts disclosed a case of manifest error of law (ie on a matter of construction) on the face of the award'. At 67AR and 68AR, the court below identified an error of construction as the error of law. But with respect,

whether the arbitral tribunal was in error or not in its interpretation of the PSC, it was still nonetheless construction of the PSC. Given that the issue was a question of construction, then what was submitted to the arbitral tribunal was a specific question of law. Perhaps together, those six issues submitted to the arbitral tribunal (see para 220 at 1133AR) might have been a mixed bag of questions of both fact and or law. But in relation to the specific issue before the court below, which was the first issue submitted to the arbitral tribunal, it was so plain and evident that it was a specific question of law in which curial interference was not countenanced. It was not as if that the issue could not be settled without proof of disputed facts (for an analogy, see *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, where the Federal Court held that the question whether a person was or was not a 'workman' within the meaning of s 2 of the Industrial Relations Act 1967 must be proved). It was not open to the court below to review the award. Hence, the construction of the PSC (see 40AR, 41AR, 42AR, 57AR, 58AR, 59AR, 60AR, 61AR, 62AR, 65AR, 66AR) and the examination of the correctness of the award (see 67AR) by the court below could not be endorsed. At 67AR, the court below argued against the correctness of the construction of the PSC by the arbitral tribunal as follows:

> I have looked at the express wording of article 16, Appendix D(2), article 3.3, article 15 and section 3.2 of the Accounting Practice (Appendix C), and considered the submissions of counsel for both parties very carefully, lest I overstep the limits of this court's jurisdiction and exceed the threshold of arbitral error. True enough, the High Court's interference must be very limited and exercised only in exceptional circumstances, as aptly noted in *Hartela Contractors Ltd v Hartecon JV Sdn*, *Intelek Timur Sdn Bhd v Future Heritage* and *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd*, but I find on the facts of this application such a manifest error of construction that this court's interference is made necessary to correct an injustice to GOI. It was wrong for the majority arbitrators to have ignored the plain meanings of the words in the relevant provisions and included 'commercial sense' in the process, since the words are clear. What can be included in the accounts for purposes of the PTRR calculation on the basis of the companies' net cash flow, is the companies' share of contract costs, not sums paid by the companies as the share of contract costs that would have been payable by ONGC under article 3.3. This is expressly stated as being in consideration for past costs paid by ONGC. In effect, therefore, ONGC's share of EDP and contract costs paid by the companies, by express agreement between the companies and ONGC, is payment for past costs. Thus I agree with the conclusion of GOI's counsel that 'the past costs paid was ONGC's share of production costs'. It is also difficult to reconcile the conclusion of the majority arbitrators with section 3.2 of the Accounting Procedure (Appendix C) which makes it abundantly clear on its clear wording that costs and charges incurred before the effective date are not costs recoverable and allowable under the contract for cost recovery and production sharing purposes under the contract.

> I find therefore that the facts of this application fit within the established ground of an arbitral tribunal deciding on a matter of construction on principles not countenanced by law. It was erroneous for the majority arbitrators to have referred to commercial sense, in the face of clear contractual wording. And this error of law appears on the face of the partial award.

[45] There could be no doubt that as against the construction by the arbitral tribunal, the court below had a different construction. So evidently, therefore, the court below had treated the application before it as an appeal.

[46] But even if the issue before the court below were a question of mixed fact and law, it was still not open to the court below to reopen the issue, and or to construct the PSC (see *Pembinaan LCL Sdn Bhd v SK Styroform* and *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*). The court below had no appellate powers. If it were a question of mixed fact and law, it was only open to the court below to determine whether there was error of law on the face of the award. The court below identified an error of construction as the error of law. But an error of construction is not a sufficient ground to set aside the award (*Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* citing *Worsdell v Holden* 1 LT 14). Moreover, that so-called error of construction was not any error of law on the face of the award. As a matter of fact, no error of law appeared on the face of the dispositive provisions of the award (see 1163AR). That so-called error of law that the court below identified appeared at the conclusion of the discussion by the arbitral tribunal on the claims (see para 261 at 1148AR), which read as follows:

> The conclusion is that granting the words in Appendix D(2)(iv) – (vi) their natural meaning accords with the general scheme of articles 15 and 16 and, as well, commercial sense. There is simply no basis for reading post tax rate of return as excluding those expenses incurred by the companies under article 3.3 after the effective date.

[47] That para 261 was taken up by the court below for criticism, videlicet, that the arbitral tribunal 'included commercial sense in the process' (see 67AR), and had therefore decided on 'a matter of construction not countenanced by law'. But with respect, the court below had totally misconstrued the purport of para 261 where the arbitral tribunal concluded 'that granting the words in Appendix D(2)(iv)–(vi) their natural meaning accords with the general scheme of articles 15 and 16 and, as well, commercial sense'. The arbitral tribunal merely said in conclusion that its award accorded not only with articles 15 and 16, but also with commercial sense. Paragraph 261 could not possibly be read that the arbitral tribunal had constructed the PSC on the basis of commercial sense. The court below held 'I find therefore that the facts of this application fit within the established

ground of an arbitral tribunal deciding on a matter of construction on principles not countenanced by law. It was erroneous for the majority arbitrators to have referred to commercial sense, in the face of clear contractual wording. And this error of law appears on the face of the partial award'. It would appear that the court below had held that the arbitral tribunal had relied on commercial sense and ignored the provisions of the PSC, or that the arbitral tribunal 'had referred to commercial sense against the provisions of the PSC'. If that were so, then in either case, that could not be further from the truth. It was already seen in paras 229–260 of 1135AR–1148AR that the arbitral tribunal had considered only the provisions of the PSC. The arbitral tribunal concluded that its award accorded with articles 15 and 16. All examination of the arbitral record showed that that result was reached by construction of the PSC. It was just not legitimate to say that the arbitral tribunal 'had referred to commercial sense against the provisions of the PSC'. Reference to commercial sense was incidental, to underline the fact that the result was not illogical. In any case, it could be added that commercial sense is not a principle of construction that the law does not countenance (for a few of the all too many authorities on commercial sense as a principle of construction, see *Maitland Main Collieries Pty Ltd v Xstrata Mt Owen Pty Ltd* 2006 NSWSC 1235, where the court applied 'commercial common sense'; *Wynn Las Vegas, LLC v Mong Henry* [2009] HKCU 940, where the court held that its interpretation of the jurisdiction clauses accorded with commercial sense; *Cenargo Ltd v Empresa Nacional Bazan de Construcciones Navales Militares SA QBD* (Commercial Court) 30 January 2001, where the court preferred the interpretation that had more commercial sense; *Burford UK Properties Ltd & Ors v Forte Hotels (UK) Ltd (formerly Trust House Forte) & Ors* [2003] EWCA CIV 1800, where the court preferred the interpretation that made better commercial sense of the lease; *Whitehead Mann Ltd v Cheverny Consulting Ltd* [2006] EWCA Civ 1303, where Carnwarth LJ rejected the interpretation contrary to commercial sense; *Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 2 MLJ 770, where it was held by the former Supreme Court that in construing the agreement between two businessmen, the court was inclined to use a rule of interpretation described as 'the good commercial sense principle' as formulated by Lord Diplock in *Miramar Maritime Corp v Holborn Trading; The Miramar* [1984] AC 676, [1984] 2 All ER 326, [1984] 3 WLR 10). All the same, suffice it to say that the arbitral tribunal had not constructed the PSC on the basis of commercial sense.

[48] This was not a case where a question of law became material. The arbitral tribunal had answered a specific question of law, and its award was final. No matter what, there was no error of law on the face of the award.

A **[49]** For the reasons stated herein, I would allow the appeal.

[50] My learned brother Hasan Lah JCA who has read this judgment in draft has agreed with the above.

B *Appeal allowed with costs here and below.*

Reported by Kohila Nesan

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